SUPREME COURT U. S.
OCT 10 1961
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 487

DEHYDRATING PROCESS COMPANY,
PETITIONER,

v.

A. O. SMITH CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit in support of the judgment here sought

to be reviewed is not yet reported, but is printed as Appendix A to this petition.

The United States District Court for the District of Massachusetts did not support its direction of a verdict with an opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit here sought to be reviewed was dated and entered on July 13, 1961.

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254 (1).

Questions Presented

Whether the admitted sales policy and practice of respondent, whereby it conditions the sale or resale of one of its patented products upon the sale or resale of another of its patented products, violates Section 3 of the Clayton Act.

Whether an admitted tie-in sale is a *per se* violation of Section 3 of the Clayton Act.

Whether the *per se* rule of this Court is to be modified by excusing tie-in sales on a theory of economic justification.

Whether two articles, physically distinct and previously sold separately, can be combined in avoidance of the tie-in principle merely because the seller subsequently asserts economic justification.

Whether, if economic justification is recognized, the test for the validity of a tie-in sale may be withheld from a jury.

Whether the District Court and the Court of Appeals erred in drawing all or any inferences in favor of respondent, the movant for a directed verdict.

Statute Involved

Clayton Act, 38 Stat. 731, Section 3, Title 28, U.S.C., Section 14:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Statement of the Case

Petitioner was plaintiff in a private antitrust action tried in the District of Massachusetts to a court and jury upon the complaint allegation that respondent violated section three of the Clayton Act in refusing to permit petitioner from acquiring one of respondents products unless it also acquired another.

The tying product is respondent's silo tank unloader and the tied product is respondent's silo tank.

Petitioner is in the business of processing fish trimmings into such by-products as fish meal, a solid, and homogenized condensed fish, a liquid.

Petitioner decided to modernize its storage system, and was advised by its retained expert in materials handling, Morton Bromfield, to obtain respondent's silo tank unloader and respondent's silo tank. Thereafter Bromfield became an agent for respondent and advised respondent of petitioner's interest in its two products. Subsequently, petitioner advised Bromfield that it accepted his recommendation as to respondent's unloaders, described as superior to anything on the market, but did not accept his recommendation as to respondent's tanks, because they would store only solids, and petitioner's needs contemplated both solid and liquid storage. Petitioner then, in April of 1958, ordered from General American four General American tanks capable of storing either solids or liquids, and four of respondent's unloaders, and Bromfield so advised respondent. For seven years prior to February 28, 1958 respondent had sold its unloaders as separate items and its tanks as separate items, and General American was one of respondent's customers for separate unloaders which were installed in General American tanks. There was no evidence that this installation was in any way unsatisfactory, and there was evidence that in excess of 90% of the purchasers of separate unloaders retained them. Yet in April of 1958 respondent on several occasions refused to sell its unloaders to General American for installation in General American tanks to be erected on petitioner's premises. General American so advised petitioner, and petitioner, faced with a seasonal storage deadline and a need for respondent's unloaders, succumbed to respondent's admitted ultimatum by ordering the wanted unloaders and the unwanted tanks. Bromfield informed respondent of its success by stating in a telegram "Reality has been faced".

There was evidence that this enforced tie-in damaged petitioner in the amount of $47,000.

Upon the completion of the taking of trial testimony, the District Court directed a verdict in favor of respondent.

Petitioner appealed to the United States Court of Appeals for the First Circuit, but that Court affirmed the holding of the District Court.

Reasons For Granting The Writ

I. The *Per Se* Rule of This Court is Applicable.

Respondent offered two products, a silo tank unloader and a silo tank, both of which were patented separately and both of which it sold separately for seven years prior to February 28, 1958. On that date, respondent admits that it adopted a sales policy whereby it would only sell its unloaders for installation in its own tanks. It further admits it refused to sell four unloaders to General American for end-use by petitioner. As a result of these restrictive practices petitioner and others who seek to purchase respondent's unloader because of its merits are required to purchase also respondent's tank regardless of its merits.

Such a condition is the boldest type of tie-in arrangement and is exactly what the Clayton Act prohibits. This Court consistently has held that such tie-in sales are *per se* violations of the antitrust laws. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451; *International Business Machines Corp.* v. *United States*, 298 U.S. 131; *International Salt Co.* v. *United States*, 332 U.S. 392; *Standard Oil Co.* v. *United States*, 337 U.S. 293; *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1.

This Court, *per curiam*, recently added its support to its consistent condemnation of tying arrangements. In *Jerrold Electronics Corp.* v. *United States*, 365 U.S. 567, re-

hear. den., 365 U.S. 890, this Court affirmed a holding which declared illegal a tying arrangement closely analogous to the factual situation in the instant case, and cited *Northern Pacific* and *International Salt*, *supra*, for authority.

In *United States* v. *Jerrold Electroncis Corp.*, (E. D. Pa., 1960) 187 F. Supp. 545, the defendant admitted that it was its policy and practice not to sell its various items of equipment designed for community antenna systems separately, but only to sell them as components of a complete system. The court held that the sale of the full system constituted the unwarranted tying of good to goods, and this was affirmed in *Jerrold Electronics*, *supra*. Just as it was illegal for the Jerrold company to tie the sale of one component of a system to another, so in the instant case, even considered in the light most favorable to respondent, it is illegal for the respondent to sell one "component" of a storage "unit" with another "component" necessarily appended.

But in the instant case the facts are clear that respondent has no system or unit for sale, but rather two separate products which may be and were used completely independent of the other. In *Jerrold*, the components of the system were never sold separately but were sold as a unit or a system. Here, respondent sold the "components" separately for seven years. Thus, in the case at bar, the single unit argument cannot seriously be advanced.

Yet the Court of Appeals adopted respondent's contention that it is justified in combining two products as a tied package on the ground that the unloader was designed for installation in its own tanks, and if installed in tanks of others, the unloader's performance would adversely affect respondent's good will.

Such a defense was rejected in *International Business Machines*, *supra*, pp. 138-139. There it was admitted that

it was essential for the successful operation of certain business machines that the cards used in them conform with minute tolerances to various specifications, and that deviation would adversely affect the proper operation of the machines. The machine maker, IBM, stressed that use of cards other than its own in its machines would cause inaccuracies in the functioning of the machines with attendant serious consequences and would damage the reputation of the machines and the good will of IBM. This Court noted that there was no contention that others could not meet the required card specifications, and held the compulsory tie-in sale of cards to the use of the business machines was a *per se* violation of the Clayton Act.

The Court of Appeals concedes that the defendant in *International Salt* was foreclosed by this Court from proving the reasonableness of its arrangement of tying its salt to its dispensers, but held that this Court clearly implied

> . . . that if other appropriate salt was not available defendant might have insisted upon the use of its own.

We respectfully suggest that this Court in both *International Salt* and *International Business Machines* noted that there was no proof that others could not meet the specifications for salt or for business machine cards, and we suggest in the case at bar there not only was no proof that respondent's unloaders would not work in tanks of other makers, but there was proof that others had made tanks in which respondent's unloaders could and did perform satisfactorily.

Moreover, as will be discussed below, the Court of Appeals placed the burden of proof of unreasonableness of the tie-in arrangement on petitioner rather than on respondent, and made all inferences in favor of respondent rather than in favor of petitioner.

The Court of Appeals chose to substitute and expand the dictum of the district court in *Jerrold* for the sound *per se* rule of this Court as held and applied in *Northern Pacific*, *International Salt* and *International Business Machines*, *supra*. The Court of Appeals recognized that this Court did not have this dictum before it on appeal, yet it held:

> We think the principle recognized by the district court in *Jerrold*, that a proper business reason may justify what might otherwise be an unlawful tie-in, is sound.

But the Court of Appeals did not stop with a substitution of district court dictum for the established holdings of this Court. The *Jerrold* case at district level commented before condemning the tie-in sale, that it may have been permissible when the small company was getting on its feet in an infant industry also being invaded by giants of the electronics industry, but the time for justification had passed and the defendant failed to satisfy the burden of showing justification. The Court of Appeals in the instant case expanded this dictum to permit a major established company in an established industry to tie together two products, each separately patented at different times and each sold separately for seven years! If the dictum in the *Jerrold* case is a nail in the coffin of the *per se* rule of this Court, the instant decision of the First Circuit is its burial.

II. Petitioner Was Entitled to Have a Jury Determination of the Issues.

Respondent tied together normally separate products, and it thereby violated the antitrust laws. If evidence of justification is permitted, the burden of persuasion is on

respondent. The determination as to the satisfaction of that burden is for the jury, not the court.

It is not for the court to accept all uncontroverted evidence as inherently reasonable, for the triers of fact can weigh it with all of the evidence under all of the circumstances and conclude that it is unworthy of belief.

III. The Courts Below Were Bound to But Did Not Draw All Inferences in Favor of Petitioner.

On a motion for a directed verdict, it is the duty of the district court to draw all reasonable inferences against the party making the motion, in this case, the respondent. The First Circuit recognized this in *Roche* v. *New Hampshire National Bank*, (C.A. 1, 1951) 192 F.2d 203, 204, where it held:

> But where the evidence is conflicting or there is insufficient evidence to make only a 'one way' verdict reasonably possible, a directed verdict is improper. . . .
>
> . . . On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Petitioner submits that on the evidence accepted at trial, it has established a *prima facie* case that respondent has violated the antitrust laws and has caused direct adverse impact on appellant with definitely ascertainable monetary damages.

Petitioner further submits that the Court of Appeals did not consider the evidence in its strongest light in favor of

petitioner, nor did it give petitioner the advantage of every fair and reasonable intendment that the evidence justified.

For instance the Court states

> Whatever may be meant by per se, we must first consider whatever may be fairly treated by a *seller* as inseparable. (Emphasis supplied)

Should not the Court of Appeals, as a first consideration, have considered what the *buyer* (the one against whom the verdict was directed) may fairly treat as separable?

Again, the evidence showed that of 80 unloaders sold separately to 36 customers, 18 customers made some sort of complaints but only 6 unloaders were returned. As to this, the Court of Appeals states

> We believe the Court was warranted in accepting defendant's uncontroverted evidence as inherently reasonable, and in holding a record of 50% dissatisfied customers over a seven-year period a matter too substantial to be disregarded.

Should not the Court of Appeals have concluded from this evidence that of the 80 unloaders sold only 6, or 7½% were returned, and as to this 7½% there was evidence that the dissatisfaction was due to the fault of the customers. Furthermore, as discussed above, why should the trial court accept evidence as inherently reasonable when a jury could disbelieve it?

Yet again, the Court of Appeals held

> Therefore at the least it was reasonable for the defendant to have insisted upon the use of a tank or silo which met the specifications it had found necessary.

Should not the Court of Appeals have considered the Answer of respondent which states

> . . . that the defendant in February, 1958, determined that the defendant could not practicably supply the detailed storage bin specifications required for the satisfactory installation and operation of Smith unloaders in storage bins other than Smith storage units, and, accordingly, adopted a policy that thereafter Smith unloaders would not be sold by the defendant for installation in other than Smith storage units . . .

And could not this have been disbelieved?

Should the Court of Appeals have placed a higher burden on petitioner to prove a violation of Clayton, Section 3, than is required by the government? Concededly, a private plaintiff must also prove impact and damages, but as to the issue of violation of the statute, a private plaintiff must prove no more than the government.

Lastly, the Court of Appeals concluded that petitioner has not shown that an equivalent tank might have been obtained for less. This is flatly contrary to the evidence, which shows not only that an equivalent tank could be obtained for less, but that for petitioner's purposes a better tank could be obtained for less.

Conclusion

Petitioner submits that it has established a *prima facie* case as to violation of the antitrust laws by respondent with attendant adverse impact on petitioner and resulting ascertainable monetary damages.

Hence, the judgment of the United States Court of Appeals for the First Circuit should be reversed, and to that end the writ herein prayed for should issue.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 5814.

DEHYDRATING PROCESS COMPANY,

PLAINTIFF, APPELLANT,

v.

A. O. SMITH CORPORATION,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Ralph Warren Sullivan, with whom *James M. Malloy*, *Morton Myerson*, *Harry Bergson, Jr.*, *Malloy, Sullivan & Myerson* and *Bergson & Wolf* were on brief, for appellant.

John M. Harrington, Jr., with whom *James N. Johnson*, *Porter, Lauritzen, Quale, Porter & Zirbel* and *Ropes & Gray* were on brief, for appellee.

OPINION OF THE COURT.

July 13, 1961.

ALDRICH, *Circuit Judge*. This private treble-damage action under section 4 of the Clayton Act, 15 U.S.C. 15, resulted in a directed verdict in favor of the defendant at the close of the evidence. Defendant urged a number of grounds. Only one, which goes to the heart of the matter, need be considered.

Defendant-appellee, a New York corporation with a factory in Wisconsin, is a national manufacturer of storage

equipment; inter alia, a patented glass-lined silo, and a patented unloading device, hereinafter unloader. The unloader is a sweep-arm, installed inside at the bottom of the silo, which, when operated, directs the settling stored material out through a slot in the base. From 1951 through 1957, if requested, defendant sold its unloader separately from its silo. In 1958, allegedly because of complaints by customers who had purchased separate unloaders, defendant adopted a policy of not selling unloaders unless they were to be installed in presently-purchased, or already-owned [1] silos of its own manufacture. Plaintiff contends that this was a tie-in sale violative of section 3 of the Clayton Act, 15 U.S.C. §14.[2]

Plaintiff-appellant, a Massachusetts corporation, is engaged in the manufacture of fish products, including fish meal, a dry, granular material, and homogenized condensed fish, a liquid. Fish meal was formerly sold in bags, but customers came to wish it in bulk. This presented a storage problem. Plaintiff employed a management consultant engineer, who recommended defendant's unloader and silo.[3] Because the silo was not water-tight it could not be used to store homogenized fish. In order to gain flexibility plaintiff decided to use defendant's unloaders, but with water-

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[1] Defendant's silos were demountable, and there was some evidence of a second-hand market therein. The defendant did not have the reverse policy, that customers to whom it sold silos must purchase or use its unloaders.

[2] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods, . . . whether patented or unpatented, . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller . . ."

Because defendant would sell an unloader without its silo if the purchaser already had one, it is apparent that this was not strictly a tie-in sale policy. Whatever consequences this may have, we do not hold that this makes the statute inapplicable.

[3] It is not insignificant that plaintiff's engineer advised the use of both together even before he knew of defendant's policy requiring it.

tight tanks so that if it should have an increase in its homogenized fish business and a decrease in fish meal it could remove the unloaders, plug up the bottom of the tanks, and use them to store the liquid fish product. It made a package contract with the G.A.T. Corporation for four of defendant's unloaders, to be installed by G.A.T. in four G.A.T. tanks. When G.A.T. ordered unloaders from defendant to complete this contract, defendant informed it of its new policy and refused to sell. Plaintiff permitted G.A.T. to rescind its contract. It then, through an intermediary, acquired four of defendant's unloaders and silos. Subsequently plaintiff suspended the manufacture of fish meal and increased its homogenized fish business. It sued defendant, claiming damages because defendant's units were more expensive than the G.A.T. combination, because loss of its G.T.A. contract occasioned an installation delay, and because it does not now have the alternative homogenized fish storage that the combination it preferred would have permitted.

In *United States* v. *Jerrold Electronics Corp.*, D.C.E.D. Pa., 1960, 187 F. Supp. 545, in a well-considered opinion in a case involving a TV aerial system, Judge Van Dusen stated, at 559,

> "The difficult question raised by the defendants is whether this should be treated as a case of tying the sale of one product to the sale of another product or merely as the sale of a single product. It is apparent that, as a general rule, a manufacturer cannot be forced to deal in the minimum product that could be sold or is usually sold. On the other hand, it is equally clear that one cannot circumvent the anti-trust laws simply by claiming that he is selling a single product. The facts must be examined to ascertain whether or not there are legitimate reasons for selling normally

> separate items in a combined form to dispel any inferences that it is really a disguised tie-in."

The court went on to say that the parts to the aerial system there involved could not normally be said to be a single product. It nevertheless held that the Clayton Act was not violated during the period for which justification from a business standpoint—apart from an illegal purpose—was shown for insisting upon a combination sale. It placed the burden of justification upon the defendant.[4]

We think the principle recognized by the district court in *Jerrold*, that a proper business reason may justify what might otherwise be an unlawful tie-in, is sound. Although plaintiff cites *International Salt Co. v. United States*, 1947, 332 U.S. 392, we find its language, instead, favorable to the defendant. It is true that the defendant there was foreclosed from proving that the requirement that only its own salt be used in its machines was "reasonable," but examination discloses that this was because its proffered proof did not go far enough. The court said, at pp. 397-98, "Of course, a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. . . . But it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone [else and] . . . it is admitted that, at times, at least, competitors do offer such a product." This seems a clear implication that if other appropriate salt was not available defendant might have insisted upon the use of its own.

We may agree with the plaintiff that the compulsory joining of two "separate" articles is a per se violation of the act. This statement, however, solves nothing. Arti-

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[4] *Jerrold* was affirmed, per curiam, 1961, 365 U.S. 567, but the appeal involved only the district court's finding of illegality for the period that the defendant-appellant failed to prove justification.

cles, though physically distinct, may be related through circumstances. The sound business interests of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. It would not be thought, for example, that a one-legged man could insist on purchasing only a left shoe. Whatever may be meant by per se, we must first consider what may be fairly treated by a seller as inseparable. See, in general, *Turner, The Validity of Tying Arrangements* under the Antitrust Laws, 72 Harv.L.Rev. 50, 68-72. (1958).

From 1951 to 1957 the defendant sold eighty unloaders to thirty-six customers who did not use its silos. Eighteen of these customers made claims, and six unloaders were taken back for refund.[5] The principal reasons for the complaints were that, in spite of defendant's educational efforts, its customers did not install the unloaders in containers having correct mechanical tolerances, or that their containers lacked a sufficiently slippery inside surface, comparable to defendant's glass lining, to allow their particular material to have the gravity down-feed needed to permit the unloader to function. It may be assumed, however, that defendant did not readily escape claims, or the consequent injury to its reputation, by telling its customers that the fault was theirs.

It is true that this evidence came from defendant's witnesses. Some, however, was introduced by the plaintiff as part of its case, and none was in any way impeached or contradicted. For purposes of a directed verdict the court was warranted in considering it.[6]

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[5] While complaints were received also from customers who used defendant's unloaders in defendant's silos, these were "to a considerably lesser degree." Defendant offered its records to permit detailed inquiry into this subject, but plaintiff did not pursue it. We accordingly accept this generalization at its face value.

[6] All courts of course agree that on a motion for a directed verdict the evidence must be "viewed" most favorably to the opposing party.

The plaintiff contends that even if the principle of business justification is sound, it was for the jury to decide whether defendant's ground for claiming it was sufficient. We find no jury question. We believe the court was warranted in accepting defendant's uncontroverted evidence as inherently reasonable, and in holding a record of 50 per cent dissatisfied customers over a seven-year period a matter too substantial to be disregarded. Particularly was this so with respect to this plaintiff, whose engineer informed defendant at the outset that fish meal presented special unloading difficulties.[7] Therefore at the least it

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Less often, however, is the question articulated whether the field of vision encompasses in any degree uncontradicted evidence introduced by the movant. In *Wilkerson* v. *McCarthy*, 1949, 336 U.S. 53, 57, the court held that such evidence could not be regarded. This, however, was a FELA case, and it is perhaps justifiable to consider such cases on their own bottom, see, *e.g.*, *Kernan* v. *American Dredging Co.*, 1958, 355 U.S. 426, at least if there are current common-law decisions to the contrary. In *Pence* v. *United States*, 1942, 316 U.S. 332, the defendant was held to have established an affirmative defense as matter of law by introducing evidence which the court held to be "no way improbable" (*id.* at 339), and which being uncontradicted, it regarded as "overwhelming" (*id.* at 350). See also the earlier leading case of *North Pennsylvania R.R.* v. *Commercial Bank*, 1887, 123 U.S. 727 (verdict directed for plaintiff where "no conflict in the evidence.") We do not appear to have considered this question ourselves, but a number of other circuits have reached this result without even discussion. See, *e.g.*, *Rhodes* v. *Metropolitan Life Insurance Co.*, 5 Cir., 1949, 172 F.2d 183, *cert. den.* 337 U.S. 930; *Brunner* v. *Minneapolis, St. P. & S. Ste. M. Ry.*, 7 Cir., 1957, 240 F.2d 608, 609; *Norfolk Southern Ry.* v. *Davis Frozen Foods, Inc.*, 4 Cir., 1952, 195 F.2d 662. In the last case, in directing in favor of the plaintiff, the court said, at p. 665, "The fact that the burden of this issue rested upon the plaintiff is immaterial; for the rule is well settled that the court, upon request, should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto." See, in general, Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555, 581-82 (1950).

[7] He wrote, "In storage [fish meal] becomes somewhat cakey and will bridge." This we take to mean that if there is frictional support at the tank walls, the meal will form arches instead of falling, a condition which would prevent the unloader from operating.

was reasonable for the defendant to have insisted upon the use of a tank or silo which met the specifications it had found necessary. *Cf. Emsig Manufacturing Co. v. Rochester Button Co.*, D.C.S.D.N.Y., 1958, 163 F. Supp. 414.[8] As we have had occasion to observe before, see *Brown v. Western Massachusetts Theatres, Inc.*, 1 Cir., 1961, 288 F.2d 302, 305, the antitrust laws do not require a business to cut its own throat.

If containers were made by others to defendant's essential specifications,[9] that portion of defendant's policy which required the use or purchase of its own silos as distinguished from such others may well have been improper. But it is not such impropriety of which plaintiff complains. This is not a government suit testing the broad aspects of defendant's conduct, but a private action in which the plaintiff seeks, and must establish, its damages. A consumer may well be damaged by antitrust violations requiring him to make a purchase on terms that he does not wish, *cf. Chattanooga Foundry and Pipe Works v. Atlanta*, 1906, 203 U.S. 390, but he has the burden of proving that he was wrongly affected. This the plaintiff has failed to do. It has not shown that defendant charged an unreasonable price, or that an equivalent product might have been obtained for less. Plaintiff's only damage came from having to meet defendant's specifications with respect to its stor-

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[8] It is true that *Emsig* and *International Salt* involve leases rather than sales, and that a lessor, particularly one having a maintenance obligation, has a special interest to protect. However, legitimate economic interest does not necessarily depend upon title. We cannot agree with the suggestion by Turner, *op. cit. supra* at 64, that a case such as the one at bar can be disregarded because it would be rare. We do not believe that a manufacturer can be compelled to sell something under circumstances requiring it to issue a caveat, "We will not give our usual warranties, because we know your proposed specifications are not going to work."

[9] Unlike *International Salt*, the record is bare on this subject. We need not decide in this case where the burden of proof lies.

age containers. Since this requirement has been demonstrated to be reasonable, plaintiff has suffered no compensable loss.

Judgment will be entered affirming the judgment of the District Court.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 487

DEHYDRATING PROCESS COMPANY,
PETITIONER,

v.

A. O. SMITH CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1961

No. 487

DEHYDRATING PROCESS COMPANY,
PETITIONER,

v.

A. O. SMITH CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals is reported at 292 F.2d 653 and appears at pp. 13-20 of the Petition.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the judgment of the District Court for the defendant, which was entered upon a directed verdict, in this private treble damage action claiming that respondent violated Section 3 of the Clayton Act in making a sale of its mechanized storage system after petitioner had unsuccessfully attempted to buy one component thereof separately, where the mechanized storage system was a single product, there was no proof of any other sale made by respondent of its mechanized storage system, and no proof by petitioner of compensable loss arising from the purchase which it made?

STATEMENT

Petitioner, a processor of fish products, brought this action on August 6, 1959 against respondent, a manufacturer of mechanized storage units to recover triple damages allegedly sustained by reason of the defendant's alleged violation of Section 3 of the Clayton Act and Section 1 of the Sherman Act. At the conclusion of the trial the petitioner waived its claim with respect to the alleged Sherman Act violation (R.A. 181). The complaint (R.A. 1-8) alleged that the respondent, which manufactured a unit known as Permaglas Mechanized Storage Unit for storing food and agricultural products, refused to sell separately a mechanical sweep arm unloader used in the storage unit unless the plaintiff bought the complete unit; that the plaintiff did purchase four such units; and that "By reason of defendant's refusal to sell" the unloader unless the plaintiff bought the entire unit, plaintiff suffered substantial loss and injury to its business.

The case was tried to a jury and at the close of all the evidence for both petitioner and respondent, respondent moved for a directed verdict on the ground that there was no evidence on which the jury could find a violation of Section 3 of the Clayton Act, or on which it could find the amount of damages sustained by the

plaintiff as a direct and proximate result of said violation if any violation were shown (R.A. 209). The trial court directed a verdict for respondent (R. 202) and judgment was entered thereon.

The Court of Appeals for the First Circuit unanimously affirmed this judgment. Its opinion, while observing that the defendant urged a number of grounds, considered principally one ground, which the opinion stated went to the heart of the matter.

The evidence at trial had shown the following: The equipment manufactured by the respondent which is involved is a mechanized storage system consisting of a silo-like unit of glass coated steel and a mechanical unloader which unloads the silo by means of a sweep-arm which rotates horizontally about a pivot in the base of the glass coated silo and, by cutter hooks moving on the arm, directs the settling stored material out through a slot in the base. (R.A. 159, 161-162, 165, Petitioner's Exhibit 11, R.A. 98, 233, 237) The unloader was designed to be used as an integral part of the glass coated silo (R.A. 163). The unloader and the silo are both patented. The unit is sold for industrial purposes by its registered trademark "Permaglas Mechanized Storage Unit." (R.A. 10-11, 159, Petitioner's Exhibit 15, R.A. 105, 246-249)

During the period 1951 through 1957 respondent sold or allowed its then current national distributor, on an experimental basis, to sell unloaders separately to thirty-six customers for installation in storage units made by others. (R.A. 161) The experiment was a failure. Half of the thirty-six customers were dissatisfied with the unloader, either returning the unloaders for refund or making claims for damage against respondent and its distributor. (R.A. 161) On February 28, 1958, as a result of this unsatisfactory experiment, respondent decided to sell its mechanical sweep-arm unloader for use only in the structure for which it had been designed, i.e., the respondent's glass coated silo. (R.A. 163)

Petitioner became interested in a mechanical bulk storage system for its fish meal sometime prior to December, 1957. (R.A. 41, 83) Petitioner retained an expert who, prior to any knowledge by him of respondent's policy, recommended a Smith unloader and silo (R.A. 116).* Fish meal, which in storage becomes somewhat cakey and will "bridge", was a difficult material to handle. (Petitioner's Ex. 8, R.A. 92-93, 225) However, while its expert was negotiating on behalf of petitioner with respondent for its equipment, the petitioner by its Vice President Ryan, on April 11, 1953, entered into a contract with General American Transportation Corporation (hereinafter "General American") for the furnishing by General American of four General American non-glass coated steel tanks of welded watertight construction and four of respondent's unloaders (R.A. 42-43; Petitioner's Ex. 3, 4, R.A. 43, 215-221), the petitioner thereby intending to obtain tanks which would have the potential of being converted to storage of homogenized condensed fish, a liquid product. (R.A. 44-45, 64-66)

When General American was unable to obtain Smith unloaders because of respondent's decision to sell unloaders only as components of its own system (R.A. 18-19), petitioner ordered the Permaglas Mechanized Storage Units from Bromfield Manufacturing Co., Inc. (R.A. 61-62; Respondent's Ex. B, R.A. 61, 292), mechanical engineers and ship repairers, a company unrelated to respondent or petitioner, owned by Morton Bromfield's father (R.A. 106-107). Bromfield Manufacturing Co., Inc. ordered the said units from respondent (Petitioner's Ex. 16, R.A. 106, 251) and paid it therefor (R.A. 153-154; Petitioner's Ex. J.K. R.A. 305-312). Bromfield Manufacturing Co., Inc. in turn received payment from petitioner (R.A. 119-120, Petitioner's Ex. 22, R.A. 120, 259-265).

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* Petitioner's statement that the expert, Morton Bromfield, became an agent for respondent (Pet. p. 4) is incorrect. (See R.A. 192.)

Petitioner then allowed General American to rescind its contract (R.A. 47-48, 58-59). The present action was brought by petitioner approximately one year after installation of respondent's system at its premises.

ARGUMENT

Although the petition does not clearly refer to any of the recognized reasons for granting a writ of certiorari (Revised Rules of the Supreme Court of the United States, Rule 19), presumably what it is trying to assert is that the decision of the Court of Appeals is not in accord with applicable decisions of this Court. Thus, it claims (Pet. p. 2) that the Court below did not follow the "*per se* rule of this Court" with respect to tying arrangements. But this claim—the only reason advanced which might justify granting the petition—cannot be supported. It rests on a misconception both of the holding below and of the decisions of this Court cited in the petition.

What the cases cited by petitioner (Pet. p. 5) hold is that agreements by one party to sell (or lease) one product only on the condition that the buyer (or lessee) buys (or leases) a different and distinct product is a violation of Section 3 of the Clayton Act if the seller (or lessor) has sufficient economic power to impose appreciable restraint on competition in the tied product and if the volume of business in the tied product affected by the agreement is not "insubstantial".

The Court below fully recognized this principle. Indeed, it said: "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act". (Pet. p. 16; 292 F.2d 653, 655) But, as it went on to point out, the very question at issue in this case was whether the unloader, a component of the patented storage system, had to be treated as a "separate" product which respondent was required to sell independently for installation in other types of storage containers. As this Court has held, no tying problem even arises unless there are two sepa-

rate and distinct items. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614, 627. See *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5, 10. In every case in which this Court has condemned tying arrangements, the tied and tying items were clearly separate and unrelated, as, for example, machines and cards (*International Business Machines Corp.* v. *United States*, 298 U.S. 131) or machines and salt tablets (*International Salt Co.* v. *United States*, 332 U.S. 392).

The petitioner thus begs the whole question in stating that the issue presented is whether "an admitted tie-in sale is a *per se* violation of Section 3 of the Clayton Act" (Pet. p. 2) and in asserting that the facts are clear that respondent has "no system or unit for sale, but rather two separate products" (Pet. p. 6). The sweep arm unloader in question was a component of a single mechanized storage unit (R.A. 159) specifically designed for use in a glass-coated steel container (R.A. 163). The whole unit was sold under the name Permaglas Mechanized Storage Unit (Petitioner's Ex. 15, R.A. 105, 249). Of course, the unloader was physically separable from the container. But almost any complex manufactured product can be broken down physically into separate components. Yet it would scarcely be contended that every manufacturer must sell separately each item which goes to make up the total product. Automobile manufacturers do not sell wheels or doors separate from the automobile as a whole. Sellers of men's clothing do not break up a three-piece suit and offer to sell the coat or the vest or the trousers as individual items.

Petitioner argues that the unloader must be treated as an independent product because respondent, as an experiment, for a time sold the unloader component separately for use in other systems. But that experiment demonstrated that the unloader could not be operated efficiently except in the container in which it was designed to be used. Obviously the unsuccessful effort to sell unloaders separately does not support petitioner's proposition.

Petitioner's reliance on *Jerrold Electronics Corp.* v. *United States*, 81 S. Ct. 755 (1961), affirming *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), is misplaced. That case involved the question whether a manufacturer of community television antennae systems violated Section 3 of the Clayton Act by insisting on selling the complete system as a single product. Despite the fact that the various parts making up the system could not normally be regarded as constituting a single product, that other manufacturers regularly supplied equivalent parts as individual items and that the defendant's practices over a period of years had attained for it 75% to 80% of the market, the District Court held that defendant's full-system sales policy was not a violation of the Act so long as it was justified by the considerations of requiring satisfactory performance and that it became a violation only after it ceased to be so justified. The Government did not appeal from that decision. The District Court's conclusion that defendant's policy was justified for a period of years was not, as petitioner claims (Pet. p. 8), "dictum" but a basic and essential part of its judgment. That holding, like the similar holding of the court below in this case, was no departure from decisions of this Court. Both courts followed and applied the well-settled rule that a seller or lessor may impose restrictions or requirements designed in good faith to assure satisfactory operation of the product sold or leased. See, *e.g.*, *International Salt Co.* v. *United States*, 332 U.S. 392, 397-398; *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 139-140; *Pick Mfg. Co.* v. *General Motors Corporation*, 80 F.2d 641, 643 (7th Cir. 1935), *aff'd* 299 U.S. 3. *Cf. Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463; *General Talking Pictures Corporation* v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650, 666 (D. Del. 1937); *Williams* v. *Hughes Tool Co.*, 186 F. 2d 278, 285 (10th Cir. 1950), *cert. denied* 341 U.S. 903; *United States* v. *Parker-*

Rust-Proof Co., 61 F. Supp. 805, 813 (E.D. Mich. 1945). The court below pointed out that if others had made containers which would satisfy the requirements for proper operation of respondent's unloader, there might have been no justification for respondent's insistence on the unloader being sold for use only in its own storage unit. But there was no evidence in the record to show that such containers were available. The case thus differs markedly from *International Business Machines* and *International Salt*, in which there was affirmative proof that competitors did in fact make products which worked perfectly in the lessor's machines.

Petitioner asserts that "there was proof that others had made tanks in which respondent's unloaders could and did perform satisfactorily" (Pet. p. 7). But it does not support this assertion by any reference to the record. It could not do so because the proof was to the contrary. As the opinion of the Court of Appeals sets forth (Pet. p. 17; 292 F.2d 653, 656), over a seven-year experimental period 50% of the customers who had installed the unloader in silos made by others expressed positive dissatisfaction with the operation of the unloader, either making claims or returning them for refund.

But even if there had been a "tie-in" sale of two separate items, as petitioner claims, the judgment for respondent was correct since there was no proof whatsoever as to the substantial effect on competition or the tendency to a monopoly required to establish a violation of the Clayton Act. The only sale shown was a single sale to one purchaser of four Permaglas Mechanized Storage Units (Petitioner's Ex. 16, 17, R.A. 106, 108, 251-253). There was no proof of any sales except the one in question. The evidence did establish that on February 28, 1958 respondent made a decision not to sell the unloader except for installation in the permaglas container for which it had been designed (R.A. 17, 163, 168, 173) and that pursuant to that policy it did refuse to sell unloaders separately to General American (R.A. 18-19); and that it advised other inquiring cus-

tomers of that policy (R.A. 17-22). But there was no showing that since 1958 respondent has, in fact, ever sold any storage systems whatsoever to anyone else.

Of course, neither a policy of refusing to sell nor actual refusals to sell constitute a violation of Section 3 of the Clayton Act. What the Act forbids is a "sale". Without proof of actual sales, no violation is shown. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952) *cert. denied* 345 U.S. 925; *Leo J. Meyberg Co.* v. *Eureka Williams Corp.*, 215 F.2d 100 (9th Cir. 1954), *cert. denied* 348 U.S. 875; *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 215 F.2d 372, 376 (9th Cir. 1954); *Allied Equipment Co.* v. *Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir. 1956); *McElhenny Co., Inc.* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959). Since in this case there was only one sale, petitioner could hardly establish that that single sale tended to substantially lessen competition or create a monopoly.

This Court has repeatedly pointed out that a tying arrangement is invalid if, and only if, the volume of business affected by the arrangement is "not insubstantial" and competitors are "foreclosed from a substantial market". *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11; *International Salt Co.* v. *United States*, 332 U.S. 392, 396; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 304-305. In each of the cases in which tying clauses have been condemned, there was affirmative proof of a series of sales or leases extending over a period of years and as to the extent of the market in the tied product and the amount of business affected by the tying clause. Thus, in *International Business Machines Corp.* v. *United States*, 298 U.S. 131, the lessor annually sold 3,000,000,000 cards, or 81% of the tied product, and derived annual gross receipts of $3,192,700 therefrom. In *International Salt Co.* v. *United States*, 332 U.S. 392, the lessor had about 900 leases outstanding containing the tying provision and in one year sold 119,000 tons of salt (the tied product) for $500,000. In *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, over a thousand leases, covering several million

acres of land, containing "preferential routing" clauses were characterized by this Court as a "host of tying arrangements". In *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd* 81 S. Ct. 775, the defendant had command of from 75% to 80% (187 F. Supp. at 554, 555) of the market for the tying and tied products.

In the present case, however, the record is utterly barren of any evidence as to the extent of the market in unloading devices or in silos or as to the extent to which competitors were or could have been "foreclosed" from any part of either market. The respondent was one out of about 100 manufacturers of storage bin unloading equipment in the United States (R.A. 166). What percentage of the business it had at any time, either before or after 1958, was not shown. Certainly in the fish processing field its share of business was utterly insignificant. Apart from the petitioner, only two fish processors, out of the 134 fish processors in the United States (Respondent's Ex. L, R.A. 158, 313-318), ever purchased respondent's unit, one in 1953 (R.A. 142) and the other in 1955 (R.A. 141, 142). As to the sale or use of respondent's system in other fields, the record is silent. After 1958 the respondent advised a number of potential customers who inquired that its unloader was available for use only in the Permaglas Storage Unit (R.A. 17-22), but it does not appear that any one of these potential customers ever bought anything. Thus, the only possible business which could have been affected by the single sale proved was the business involved in that one sale. Of course, competitors were "foreclosed" from that particular sale, as competitors are every time any sale is made. But no one has yet suggested that every seller who sells anything is thereby violating the anti-trust laws. On this aspect of petitioner's cause of action there was a total failure of proof.

The judgment of the court below was likewise correct because petitioner failed to show compensable damage. While petitioner makes the unsupported assertion that

"There was evidence that this enforced tie-in damaged petitioner in the amount of $47,000" (Pet. p. 5), the record demonstrates that there was no proof of this element of the plaintiff's case. As the opinion of the Court of Appeals sets forth, the petitioner had the burden of proving it was wrongfully affected by the sale, and this the petitioner has failed to do.

There being no evidence—and no contention—that respondent's price was unreasonable, the gravamen of the offense, if there were one, would be the insistence by the respondent on the purchase of respondent's system when there was available some other system with which respondent's unloader would have performed satisfactorily. The Court of Appeals found nothing in the record to indicate the existence of any such system, and thus there could be no evidence of damage arising from the sale.

Indeed, petitioner did not in fact purchase anything from respondent but rather purchased the respondent's system from a third party, i.e., Bromfield Manufacturing Co., Inc. Any damage to petitioner from respondent's sale to Bromfield Manufacturing Co., Inc. could at most be incidental. However, the petitioner failed to show that it was wrongfully affected in any way by any sale, either directly or indirectly.

Petitioner's contentions on damages are, in fact, not directed to a sale, but only to the refusal to sell. Petitioner's allegation of damage in its complaint is contained in paragraph 13 (Pet. p. 7-8), which is here quoted in its entirety:

> "13. By reason of defendant's refusal to sell its Harvestore Unloaders to plaintiff except on the condition that plaintiff purchase A. O. Smith Corporation silo bins, plaintiff has suffered a substantial loss and been injured in its business: (1) through the increase in costs to it by being forced to purchase and erect the more costly silo bins manufactured by defendant; (2) by the consequent delay in construction of defendant's silo bins which thereby increased

plaintiff's handling and processing costs during the additional period of construction, and (3) by the possession of silo bins of a type usable in only a portion of plaintiff's business by reason of defendant's illegal action."

While petitioner's proof was insufficient to establish even these asserted damages, inasmuch as it failed to prove the reasonablesness of its alleged excess costs of construction, failed to relate its items of loss to the alleged period of delay, and introduced no evidence of conversion costs of the General American system, the evidence on damages went only to those claims. But those claims of damage, no matter what the state of the proof with respect to them, cannot be recovered in this, or any, anti-trust action.

Those alleged damages stem not from the sale which was made—but from respondent's refusal to sell to General American. As has been pointed out above in this brief, page 9, it is established beyond contention that a refusal to sell is not a violation of Section 3 of the Clayton Act.

In essence those are breach of contract claims. But petitioner voluntarily released the contract claims it had against General American. It cannot now use this anti-trust action as a side door to recover them, particularly since such a route would confer upon it a treble damage windfall. Whatever their nature, however, the only damages asserted by petitioner are those which are based upon the refusal and for them there can be no recovery in this action, which is brought solely under the Clayton Act.

The action of the Court of Appeals in affirming the direction of a verdict for the defendant was plainly correct and certainly not a departure from any accepted principle of judicial conduct. There was nothing for the jury to decide since not only was it established on uncontroverted evidence, a part of which came from the petitioner itself, that there was only one product

involved, but also there was a total failure by the petitioner to prove that a not insignificant amount of commerce was involved and an equally complete failure of petitioner to prove any compensable damages. The discussion in the petition with respect to inferences is totally unrelated to the facts of this case, wherein there was no question of alternative permissible inferences and no question of choosing between contradictory evidence. On the record in this case there was nothing to go to a jury.

This case is essentially trivial. It involves no significant question of anti-trust law or anti-trust policy. It is, basically, an attempt by petitioner to misapply an anti-trust statute and anti-trust decisions in a very particular fact situation, a fact situation which indeed does not involve anti-trust considerations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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